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Supreme Court, U.S.
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No. 98-680

In The

Supreme Court of the United States

October Term, 1998

WILLIAM SUMNER SCOTT,

Petitioner,

vs.

PRUDENTIAL SECURITIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner, William Sumner Scott, was required to arbitrate his dispute with Respondent, Prudential Securities Incorporated, pursuant to the member to member arbitration rules enacted by the National Futures Association.

II. Whether the United States Court of Appeals for the Eleventh Circuit was correct in affirming the lower court's confirmation of the arbitration award against Petitioner and in favor of Respondent.

CERTIFICATE OF INTERESTED PARTIES

The parties in interest are listed in the caption. Prudential Securities Incorporated is a subsidiary of Prudential Securities Group Inc. Prudential Securities Group Inc. is a subsidiary of Prudential Capital and Investment Services, Inc. Prudential Capital and Investment Services, Inc. is a subsidiary of PRUCO, Inc. PRUCO, Inc. is a subsidiary of The Prudential Insurance Company of America. Prudential Securities Incorporated shares ownership in Lapine Holding Company.

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Although Petitioner has set forth eighteen Questions Presented and five Reasons for Granting the Writ, the Petitioner's argument can be reduced to two claims. First, he claims that he should not have been required to arbitrate his dispute with Respondent under the rules of the National Futures Association ("NFA") as an Associated Person (as that term is defined under the NFA rules). Second, he claims that the arbitration proceeding which resulted in a judgment against him should have been vacated on various statutory and non-statutory grounds.

Essentially, Petitioner is asking this Court to review the acts of the lower courts and reverse what he perceives are errors of law and erroneous factual determinations, in plain contravention of the guidelines for the granting of certiorari set forth in Rule 10 of the Supreme Court Rules. The United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") affirmed the lower court's confirmation of the arbitration award based on established precedent in the Eleventh Circuit and after careful review of the lower court's detailed findings of fact. The Petition clearly demonstrates that there is no conflict between the circuit courts of appeals on any issues and presents at most a consideration of the fact-bound application of established precedent.

STATEMENT OF THE CASE[1]

A. Course of Proceedings and Disposition in Court Below

This petition arises from the affirmance by the Eleventh Circuit of the confirmation, by the United States District Court, Northern District of Georgia, Atlanta Division, (the "District Court") of an arbitration award against Petitioner, William

1. Petitioner's Statement of the Case is incomplete and inaccurate. Prudential Securities Incorporated therefore restates the case and facts.

Sumner Scott ("Petitioner") in a NFA arbitration proceeding in Atlanta, Georgia. The NFA arbitration award in favor of Respondent, Prudential Securities Incorporated ("PSI"), was entered on November 20, 1995. App., D-3, D-4.[2]

Petitioner filed a "Petition to Vacate, Modify and Correct CFTC Order, Initial Decision and NFA Award" ("Petition to Vacate") on December 19, 1995 in the District Court, asserting that he had never agreed to arbitrate his dispute with PSI, that the arbitration panel was biased and evidently partial, and various other misconduct by the arbitrators in conducting the arbitration. Petitioner also asserted that PSI had procured the arbitration award by fraud, that the award was arbitrary and capricious and that his due process rights were denied in the arbitration process. App., A-3. PSI served its "Answer To Petition To Vacate, Modify And Correct Arbitration Award and Motion To Confirm The Arbitration Award" ("Motion to Confirm") on February 29, 1996. App., A-3.

On April 8, 1996, the District Court entered a Consent Order, allowing Petitioner an extension of time to file and serve his reply to the Motion to Confirm, through and including ten days following the ruling by the District Court on Petitioner's pending Motion to Admit Transcript. App., D-11. The District Court denied Petitioner's Motion to Admit the Transcript by Order dated April 12, 1996. App., D-11. On July 11, 1996, Petitioner filed a "Motion For Extension Of Time For WSS To File A Reply To The Response Filed By Prudential To The Petition And For WSS To File A Response To The Motion of Prudential To Confirm The Arbitrator's [sic] Award" ("Motion for Extension"). App., D-11.

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2. All citations to the record cite to the Appendix ("App.") to Petitioner's Petition for Writ of Certiorari.

By Order dated July 18, 1996, the District Court denied Petitioner's Motion for Extension and Petition to Vacate and granted PSI's Motion to Confirm. App., D-30. Petitioner then filed a Motion for Reconsideration pursuant to Fed. R. Civ. P. 59, 60 and 61 on July 29, 1996 ("Motion for Reconsideration"). Petitioner's Motion for Reconsideration was denied on September 4, 1996. App., C-1. Petitioner filed his Notice of Appeal on September 12, 1996. On May 18, 1998, the Eleventh Circuit affirmed the District Court's confirmation of the arbitration award. App., A-20. On July 30, 1998, the Eleventh Circuit denied a Motion for Reconsideration. App., B-1. Petitioner served his Petition in this Court on October 22, 1998.

B. Statement of Facts

Petitioner is a professional commodity futures speculator and a member of the Florida bar. He is registered with the Commodity Futures Trading Commission (the "CFTC") and the NFA as an associated person.[3] Petitioner formed a limited partnership, Creative Strategy Fund I (the "Fund"), the general partner of which was Creative Strategies, Inc. ("CSI"), a corporation of which Petitioner was the sole shareholder. Petitioner was the limited partner and sole investor in the Fund. The Fund opened a commodities futures account at PSI, executing all required account opening documents. App., D-2.

In March and April 1992, the Fund suffered some losses and failed to meet its margin calls. Consequently, PSI liquidated the Fund's accounts. The liquidation of the Fund's accounts resulted in a deficit of approximately $101,000. PSI brought a NFA arbitration proceeding against the Fund, and against

3. The record evidence shows that, except for the period from June 14, 1993, through January 31, 1994, Petitioner was registered as a CFTC associated person from 1987 through at least February 27, 1996. App., D-5.

Petitioner individually, to recover the deficit. The Fund objected to the NFA arbitration proceeding and elected to bring a reparations proceeding against PSI before the CFTC. The NFA arbitration proceeding against Petitioner, individually, was suspended during the pendency of the reparations proceeding. App., A-2, A-3.

In the CFTC reparations proceeding, the Fund alleged that PSI had breached its fiduciary duty to the Fund by failing to abide by loss limits set by the Fund and by offsetting credits and debits in the Fund's various accounts. App., A-2. Concluding that there was "not a scintilla of merit to his complaint," the Administrative Law Judge (the "ALJ") dismissed the Fund's claims and entered an award of $101,000 in favor of PSI on its counterclaim against the Fund. App., D-3. The Fund appealed to the full Commission. The Commission rejected the Fund's claims and affirmed the ALJ's decision in an order dated February 8, 1995. The Fund filed an appeal with the Eleventh Circuit, but the appeal was dismissed for failure to post a bond. App., D-3.[4]

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4. The underlying litigation between PSI and Petitioner has given rise to several other actions, including:

1. *PSI v. Creative Strategy Fund I and CSI*, United States District Court, Southern District of Florida, Case No. 95-8423-CIV-GRAHAM. PSI's petition to reduce the CFTC award of February 8, 1996 to judgment was granted and the petition of the Fund and CSI for a Temporary Restraining Order to set aside or postpone the NFA arbitration against Scott was denied. The Fund and CSI filed an appeal to the Eleventh Circuit at Case Number 96-4466, which affirmed the lower court's judgment. The Fund filed a petition for writ of certiorari to this Court at Case No. 97-63, which was denied.

2. *Creative Strategy Fund I v. PSI*, United States District Court, Southern District of Florida, Case No. 96-1965-CIV-GRAHAM. The (Cont'd)

C. Renewed NFA Arbitration

After the CTFC affirmed the reparations award against the Fund, PSI renewed its NFA arbitration proceeding against Petitioner under the member to member arbitration rule. App., A-3. Petitioner objected, asserting that he had never personally agreed to arbitrate any claims between PSI and himself. App., D-5. Although aware of his objection, the NFA scheduled the arbitration for October 31, 1995. Petitioner petitioned the panel to postpone the arbitration until after the first of the year or, alternatively, to allow him to appear by telephone, claiming financial distress[5]. The panel denied both requests. On October 18, 1995, Petitioner petitioned the United States District Court for the Southern District of Florida for a Temporary Restraining Order to prevent the NFA arbitration from taking place. App.,

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(Cont'd)

Fund filed a petition to vacate the Initial Decision of the ALJ, as affirmed by the CFTC. Alternatively, the Fund requested a writ of mandamus to compel the CFTC to issue an opinion. PSI filed its response and the CFTC intervened to oppose the Petition. PSI's and the CFTC's motions to dismiss the petition were granted on the basis of collateral estoppel. The Fund appealed the decision to the Eleventh Circuit (Case No. 97-4349), but the appeal was dismissed on procedural grounds.

3. *Scott v. PSI, et al.*, United States District Court, Southern District of Florida, Case No. 96-0453-CIV-GRAHAM. Scott brought suit against PSI, and several of its officers, including the Chairman and CEO. The action was dismissed on the ground of *res judicata* and affirmed by the Eleventh Circuit, Case No. 97-4348.

Petitioner has been unsuccessful in every forum.

5. Petitioner filed his motion to appear telephonically on October 25, 1995, a mere six days before the arbitration hearing. App., A-3.

A-3. On October 30, 1995, Petitioner's petition was denied. App., A-3. Petitioner did not appear at the arbitration but submitted a lengthy affidavit setting forth his position, as well as some documents purporting to support his position. App., A-3. Petitioner did not, however, produce a significant number of the corporate records of the Fund or CSI in response to a subpoena issued by the arbitration panel. App., D-25-27.

At the arbitration, the panel considered the evidence presented by Petitioner, the initial decision of the ALJ, the CFTC's Order dated February 8, 1995 and argument by PSI's counsel. App., D-12. The arbitration panel rendered an award against Petitioner, individually, in the amount of $106,162.54. App., D-5. Petitioner, on December 19, 1995, filed his Petition to Vacate, the denial of which, along with the granting of PSI's Motion to Confirm, formed the basis of Petitioner's appeal to the Eleventh Circuit. Petitioner now seeks review of the Eleventh Circuit's affirmance of the District Court's decision.

REASONS FOR DENYING THE WRIT

I.

PETITIONER RAISES NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT, NOR DOES HE ESTABLISH THAT THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER.

This case presents no conflict between circuit courts of appeals or with this Court's precedent. Rather, Petitioner requests this Court engage in a fact-bound application of settled

law to the circumstances of this case. Petitioner has failed to set forth, in the Petition, any "compelling reasons" for granting certiorari review, as required by Supreme Court Rule 10. The Petition seeks review of an affirmance, by the Eleventh Circuit, of the confirmation of an arbitration award against Petitioner. Petitioner has failed to demonstrate that the decision under review raises any important question of law requiring this Court's review. While the guidelines set forth in Rule 10 are not controlling on this Court, the illustrations provided in Rule 10 demonstrate that a disagreement by the losing party with the decision of the court of appeals is not a sufficient basis to seek to invoke the jurisdiction of this Court.

The Court has defined the narrow parameters of its certiorari jurisdiction. In *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453 (1951), the Court explained:

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." . . .
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilted either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should

> "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."

340 U.S. at 502-503, 71 S. Ct. at 456. (citations omitted) (quotations omitted).

The Court also has more recently held that the principal purpose for which the Court invokes its certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347-348, 111 S. Ct. 1854, 1857 (1991).

II.

THE PETITION SEEKS REVIEW OF ISSUES OF LAW ON WHICH THE COURTS OF APPEALS ARE IN AGREEMENT.

This Petition presents no issues on which there is a conflict between the circuit courts of appeals. In fact, the Petitioner concedes that, in holding that Petitioner was bound to arbitrate his dispute with PSI under the NFA Rules, the Eleventh Circuit was in accord with the holding of a substantially similar case in the United States Court of Appeals for the Seventh Circuit, *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995).[6]

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6. The District Court held that the NFA Rules required Petitioner to submit the issue of arbitrability to the arbitration panel and, alternatively, that even if Petitioner had not agreed to arbitrate the issue of arbitrability, the District Court would independently have found that by registering as an associated person, Petitioner consented to arbitrate his dispute with PSI. The Eleventh Circuit held that the language of the NFA Rule was not broad enough to place the issue of arbitrability before the arbitration panel, but that the District Court was correct in its alternative holding of arbitrability. App., A-8.

Petitioner requests this Court not only reverse the Eleventh Circuit, but also overrule the holding in *Pipkin*.

In arguing that he should not have been required to arbitrate his dispute with PSI, Petitioner does not dispute that he was a CFTC-registered associated person. Rather, in the NFA proceedings, Petitioner asserted that there was no agreement to arbitrate his dispute with PSI because the documents he signed contained no arbitration clause, the NFA member to member rules requiring arbitration did not apply to him, and he is not personally a member of the NFA.

Pursuant to the NFA Member Arbitration Rules, associated persons of the CFTC are associate members of the NFA.[7] In fact, the record evidence shows that, except for the period of June 14, 1993 through January 31, 1994, Petitioner was registered as a CFTC associated person from 1987 through at least February 27, 1996.

The District Court found that Petitioner signed a Form 8-R application for registration as an associated person under the Commodity Exchange Act (the "CEA") and as an Associate in the NFA, which contained a provision that,

> execution and delivery of this application shall constitute . . . an express agreement by [applicant]

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7. The NFA Member Arbitration Rules provide:

> [u]nder NFA Bylaws every person who is associated with a Member with the meaning of the term "associated person". . . and who is required to be registered as such with the Commission, must register with the NFA as an Associate.

Member Arbitration Rule 6511.1(a). App., D-5.

> that, if registered as an Associate, [he] shall become and remain bound by *all NFA requirements as then and thereafter in effect.*

App., D-29, p. 7 (emphasis added). The NFA adopted the "Member Arbitration Rules" on May 1, 1992. The Member Arbitration Rules require that, "disputes between and among Members and Associates *shall be arbitrated* under these Rules upon the filing of a claim by a Member or Associate. . . ." App., D-7 (emphasis added).

The District Court specifically held, and the Eleventh Circuit agreed, that by registering as an associated person, Petitioner consented to having this matter arbitrated. App., A-8. In affirming the District Court's determination, the Eleventh Circuit considered a decision by the Seventh Circuit under very similar facts. In *R.J. O'Brien & Assocs. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995), R.J. O'Brien & Associates ("O'Brien") brought an action to confirm a NFA arbitration award against Pipkin, who was the president and principal stockholder of Sage and registered as an associated person under the CEA. *Id.* at 259. Pipkin registered as an associated person prior to the enactment of the Member Arbitration Rules. Pipkin challenged the NFA's jurisdiction to proceed with arbitration; the matter went to arbitration over his objection and ultimately resulted in an award in favor of O'Brien. In the district court, Pipkin responded to O'Brien's motion to confirm with a cross-motion to vacate, reasserting that registration as an associated person under the CEA did not constitute consent to arbitrate under the NFA Member Arbitration Rules. *Id.* at 259.

The district court confirmed the award and the Seventh Circuit affirmed. In affirming the decision, the Seventh Circuit specifically held that, by signing the Form 8-R and registering as an associated person under the CEA, Pipkin clearly consented

to arbitration under the NFA Member Arbitration Rules. *Id.* at 261.

This Petition presents nearly the identical fact situation as *Pipkin*. Scott registered as an associated person under the CEA and an associate of the NFA by executing Form 8-R and, in doing so, agreed to abide by the requirements of the NFA, in effect at the time or in the future. As such, he consented to the arbitration of any disputes between himself and other members or associates of the NFA. Far from demonstrating a conflict between the courts of appeals, Petitioner has demonstrated the consistency with which courts of appeals have treated this issue. As such, Petitioner has illustrated the lack of a proper basis for certiorari jurisdiction on the issue of his agreement to arbitrate.[8]

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8. Petitioner also asks this Court to modify its holding in *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) to require arbitrators to state a reason for their decision "when a party alleges to the arbitrators that fraud has been committed in their presence." Petition, p. 14. Petitioner premises this request on the unsupported assumption that the three part test for vacatur under *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) cannot be met without a written opinion by the arbitrators. *Bonar* sets forth no such requirement. Moreover, since it was decided in 1988, the *Bonar* requirements have been applied in various other jurisdictions. *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328 (7th Cir. 1995) (applying the same requirements as set forth in *Bonar* to vacate an award under 9 U.S.C. § 10(a)); *A.G. Edwards & Sons*, 967 F.2d 1401, 1404 (9th Cir. 1992) (same); *Dean Foods Co. v. United Steelworkers*, 911 F. Supp. 1116 (N.D. Ind. 1995) (same).

The Eleventh Circuit correctly applied the law as stated in *Bonar* in holding that because Petitioner had admitted that the arbitrators had the "evidence" of fraud before them, vacatur under 9 U.S.C. § 10(a)(1) was precluded. A written opinion by the arbitrators would not have altered the fact that Petitioner presented to the arbitrators his "evidence" of fraud and they rejected it. App., A-18, n.16.

III.

THE PETITION IMPROPERLY REQUESTS THIS COURT EXERCISE DISCRETIONARY JURISDICTION BASED UPON ALLEGED ERRONEOUS FACTUAL FINDINGS OR THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

Rule 10 of this Court states that a petition for writ of certiorari is "rarely granted" when the asserted error consists of "erroneous factual findings" or "the misapplication of a properly stated rule of law." In this case, the Petitioner asserts that the arbitrators misunderstood or misinterpreted the evidence presented at the arbitration and disagrees with the decision of the arbitration panel to hold him personally liable for the debts of the corporation of which he was the sole shareholder.[9]

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9. The Eleventh Circuit also rejected Petitioner's argument, reasserted in this Court, that Petitioner's membership in the NFA did not have a sufficient nexus with his dealings with PSI to support a finding of an agreement to arbitrate. In rejecting this argument, the Eleventh Circuit noted that the NFA arbitration rules did not limit the arbitration requirement to disputes between the parties which involve the NFA. The Eleventh Circuit also rejected as irrelevant Petitioner's repeated assertions that he structured the Fund's accounts with the specific intent to avoid personal liability. The Eleventh Circuit noted:

> Scott's arguments about the structure of the accounts and his personal liability have *nothing* to do with the issue at hand: whether Scott's personal status as an associate member of the NFA required him to arbitrate the merits of an alleged dispute with PSI.

App., A-17, n.12. (Emphasis in the original). Petitioner has made no showing that this holding raises any issue which invokes the certiorari jurisdiction of this Court. He merely disagrees with the Eleventh Circuit on its interpretation of the law.

Petitioner filed a Petition to Vacate the arbitration award in the District Court, which reviewed the record and affirmed in a thirty page opinion, with extensive findings of fact. Petitioner then filed an appeal in the Eleventh Circuit, asserting the same errors in findings of fact and misapplications of law. The Eleventh Circuit reviewed the record in the District Court and the District Court's opinion and affirmed the award against Petitioner. Now, Petitioner again seeks review of the same alleged erroneous factual findings and misapplications of law in this Court.

Under the language of Rule 10 and this Court's articulations of the scope of its certiorari jurisdiction, Petitioner's reliance on disputed factual matters fails to establish a basis for certiorari review. Petitioner has raised essentially this same dispute in multiple court proceedings regarding the conduct of this arbitration. Petitioner has lost on every level, both under the facts and the law. Petitioner has had his day in court on these matters and his attempt, in this Court, to seek an opportunity to relitigate factual determinations with which he is dissatisfied should not be countenanced.[10]

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10. Petitioner asserts that the filing fee required by the NFA to bring a counter-claim or third-party claim in the arbitration action constituted a denial of his access to courts under the Florida and United States Constitutions. Petitioner asserts that the NFA denied his access to courts prior to the taking of his property. Petitioner raised no claim under the United States Constitution in the lower court.

The Eleventh Circuit summarily rejected this argument. App., A-20, n.22. Even assuming that the NFA is a government body, Petitioner has provided no support for his position that an arbitration, which took place in Georgia under the rules of the NFA and in which Petitioner participated, is subject to the Florida constitutional provision guaranteeing access to courts. The Florida Constitution, article I, section 21 provides that, "[t]he courts shall be open to every person for redress

(Cont'd)

CONCLUSION

Based on the foregoing arguments of law, Respondent, Prudential Securities Incorporated, respectfully requests this Court deny the Petition for Writ of Certiorari for failing to demonstrate any basis for this Court to exercise its jurisdictional discretion.

Respectfully submitted,

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(Cont'd)

of any injury . . ." FLA CONST., art. I, § 21. Petitioner presents no support for his contention that Florida constitutional provisions apply to private arbitration proceedings in a different state.

Furthermore, Petitioner ignores the fact that he voluntarily contracted with the NFA and agreed to abide by all the requirements of the NFA, including the arbitration requirement and the filing fee requirement. *Caporale v. NASD*, No. CIV.A.90-4070, 1991 WL 281890 at *1 (D.N.J. May 10, 1991), *aff'd*, 986 F.2d 12 (3rd Cir. 1992) (by entering into arbitration agreement to be governed by the NASD rules, plaintiff contractually agreed to abide by NASD fee rules; plaintiff's claim that the fee requirement is unconscionably high does not state a constitutional claim, but rather a contractual one which must be resolved under the procedure prescribed by the NASD). Once again, Petitioner makes no showing of a basis for the invocation of this Court's jurisdiction other than his assertion that the court of appeals erred in applying the law.